82-6154

No. _____

Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment permits a trial court to disregard the stong possibility that a defendant's confessions were the product of insanity, solely because the taped record of the confessions reflected "indicia of voluntariness," and the circumstances under which the confessions were given were not coercive enough to have overridden the will and intellect of a sane person?

2. Whether a state trial court's refusal to provide an indigent defendant the assistance of an expert, in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them, violates the Sixth and Fourteenth Amendments' guarantees of the assistance of counsel and equal protection?

3. Whether the Florida Supreme Court's cursory recitation of the aggravating and mitigating circumstances found in Petitioner's case, in which the Court failed to addres- or redress substantial Eighth Amendment violations in the assessment of both aggravating and mitigating circumstances, fulfilled the Court's Eight-Amendment based review function to" ["guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, 428 U.S. 242, 251 (1976)?

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES CONTINUED

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed September 9, 1982, rehearing having been denied November 4, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 55,716 is reported as Martin v. State, 420 So.2d 583 (Fla. 1982) and is set out at pages 1a-3a in the Appendix hereto. Rehearing was denied by the Supreme Court of Florida, and the order on rehearing is set out at page 4a in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on September 9, 1982, and petitioner's timely motion for rehearing was denied by order dated November 4, 1982. (As noted, the order

denying rehearing is set out at page 4a of the Appendix.) On December 22, 1982, Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including February 2, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case further involves Section 921.141, Florida Statutes (1977), entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 5a-6a of the Appendix.

STATEMENT OF THE CASE

On August 4, 1977, petitioner and another man, Gary Forbes, were indicted for first degree murder, kidnapping, robbery, and sexual battery with respect to an incident which began late in the evening of June 25, 1977 and ended in the early morning hours of June 26, 1977. (R. 4671-4672)[1/] The incident involved the robbery of a convenience food store, during which the clerk, Patricia Greenfield, was taken from the store. Thereafter,

---

1/ The letter "R," follwed by specific page numbers, will be used to designate references to the Record on Appeal before the Supreme Court of Florida.

the clerk was "raped" by both Forbes and petitioner (R 3250, 3286), and was then killed by petitioner (R 3260-3263). Apparently, petitioner first attempted unsuccessfully to strangle Ms. Greenfield and then stabbed her in the neck. (Ibid.)

Within approximately six hours of his apprehension on July 4, 1977, petitioner (hereafter referred to as "Mr. Martin" or "petitioner") confessed to the robbery of the convenience store, and to the abduction and homicide of Ms. Greenfield. (R 3497-3515) One week later, on July 11, 1977, Mr. Martin again admitted stabbing Ms. Greenfield. (R. 3410-3515) Prior to trial, counsel for Mr. Martin sought to suppress both of these confessions as involuntarily given and as extracted in violation of Mr. Martin's right to the assistance of counsel (R. 4693-4694). In his motion and in the suppression hearing (R. 519-855; 985-1151), counsel demonstrated that with respect to the July 4 confession, Mr. Martin was subjected to a psychologically coercive interrogation at a time when he was most likely undergoing alcohol withdrawal, and, in the opinion of the only psychiatrist who considered this matter, at a time when Mr. Martin was overtly psychotic and legally insane. With respect to the July 11 confession, counsel demonstrated that Mr. Martin was interrogated immediately after he had been violently subdued (and injured) by a police officer -- in order to prevent Mr. Martin from obtaining a gun and committing suicide -- which was likewise at a time when Mr. Martin was overtly psychotic and legally insane. Despite the proof of these facts, the trial

judge found no violation of the Fourteenth Amendment and held that the confession had been voluntarily and intelligently given. (R. 4756-4760)[2/]

Because the failure to suppress these confessions is one of the questions presented to this Court, a more detailed statement of the facts presented at the suppression hearing is necessary.

With respect to the the July 4 confession, the interrogation of Mr. Martin is an example of psychological coercion as an artform.[3/] Every technique employed by Detective Glover, Detective Anderson, and Assistant State Attorney John Scarola was specifically designed to convince Mr. Martin that it was in his best interests to confess. Initially Detectives Glover and Anderson engaged in a "good guy-bad guy" routine (R. 650, 740-741). Detective Anderson directly confronted Mr. Martin with evidence, real and pretended, that they had against him (R. 696). Anderson told Mr. Martin that Gary Forbes had implicated him in the victim's death (R. 724). Mr. Martin was told that there were

---

2 / On appeal to the Supreme Court of Florida, Mr. Martin continued to argue that his confessions should have been suppressed because they were given involuntarily and in violation of his right to the assistance of counsel. (Initial Brief of Appellant, at 6-27; Reply Brief of Appellant, at 1-7; Motion for Rehearing at 8-10.) The Court summarily affirmed the trial court's ruling with the following "analysis":

> "Martin was fully and properly informed as to his rights, which he freely waived in giving the two statements. The presence of the prosecutor in the interrogation room was proper and the taped statement and testimony clearly show that Martin was not misled or promised anything for giving his statement."

Martin v. State, supra, 420 So.2d at 585 (Appendix 3a).

3/Indeed one of the detectives even described the various techniques they employed as "psychological coercion." (R. 741)

three eye witnesses who could identify him (R. 696, 746). He was further told that the reasons an inaccurate BOLO was issued was to keep him and Forbes from leaving town (R. 696). All of these assertions were untrue. In addition to these false-hoods Mr. Martin was shown a picture of the deceased's body and asked how his uncle would feel (R. 610). At one point Anderson in his role as the bad guy, shouted "You scum, scum bag mother fucker, I don't want to talk to you anymore. I hope you fry in the electric chair," and stormed out of the room (R. 693).

To Anderson's bad guy, Detective Glover and later Assistant State Attorney John Scarola played the good guy. Glover and Scarola discussed with Mr. Martin his mental problems. They promised him the court would be told of his desire for psychiatric treatment (R. 658). They continually advised Mr. Martin that the truth could only help and not hurt him (R. 614, 653-656, 746, 783). They also discussed religion with him. Scarola told Mr. Martin the story of Jesus and the two robbers. He told Mr. Martin that God does not give last chances, and it was never too late to seek salvation (R. 780). At the hearing John Scarola testifed that

> "[m]y approach was to minimize the disadvantage that might occur as a result of his giving us a statement and to maximize the advantage to Mr. Martin that might result from him giving a statement."

(R. 806)

Mr. Martin's July 4 confession was the culmation of 5½ hours of pressure-building interrogation. Over that period

of time Mr. Martin was led to believe that the State had overwhelming evidence against him and that his confession was unnecessary for his conviction. He was later told that a representative of the State Attorney's Office could explain the law to him. Indeed John Scarola proceeded to do just that. He told Mr. Martin that Florida did not have a mandatory death penalty. He explained how the bifurcated trial worked, how Mr. Martin's confession could be used against him in the first phase, and how it could help him in the second (R. 783-784).

> "I told him that he needed to consider those advantages, that advantages could be gained by giving us a statement."

(R. 811) That John Scarola actually offered Mr. Martin legal advice is clear from the taped confession itself:

> "I don't want this tape recording to have lies on it because I told you that we want it so we can use it to help you."

(R. 708) And again,

> "Lee, it is only the truth that can help you and that's what we have been trying to explain to you from the beginning."

(R. 711)

Not only were these interrogation techniques coercive: they were used against a person who was particularly vulnerable to coercion. Throughout the July 4 interrogation, Mr. Martin's behavior was bizarre. Even Detective Glover conceded that Mr. Martin's behavior during the interrogation was "abnormal" or "weird" even compared to someone being questioned for first degree murder (R. 649). These unusual signs become more and more pronounced as the interrogation proceeded (R. 647).

Specifically Mr. Martin was observed by Detective Glover to be very emotional; he was continually wringing his hands, shivering, crying, grimacing, shaking, trembling, or abnormally staring; and he was depressed (R. 647-649). Mr. Martin also used words out of context and inappropriately at times (R. 666). John Scarola described Mr. Martin during the giving of the taped statement as under emotional strain, having emotional difficulty and emotionally disturbed (R. 810, 818, 820).

Throughout the July 4th interrogation Mr. Martin's mental problems were discussed. Mr. Martin complained about uncontrollable forces which would come over him. He said that he had not had peace of mind for years, that he would alternate between feelings of depression and euphoria. At times his body would disintegrate and his mind would go into the clouds (R. 665-66).

At the suppression hearing, Mr. Martin testified that during this July 4 interrogation he felt as though his head would explode. He had nausea, his face was burning and he had a throbbing pain in his stomach (R. 995-996). As the interrogation progressed Mr. Martin felt worse and worse. He testified that he was an alcoholic, and he attributed his sickness to being away from alcohol (R 989, 996). He felt so bad that at one point he asked the Detectives if he could go back to his cell and talk the next day (R. 997). According to Mr. Martin he felt that if he gave a confession the police would take him back to his cell where he could lie down (R. 1010-1011).

When John Parr, an expert on alcohol addiction, examined

these facts, Mr. Parr concluded that, in his expert opinion, Mr. Martin was undergoing withdrawal during the interrogation (R. 1068). An untrained observer would know something was wrong with the individual but not that he was withdrawing (R. 1073). According to Mr. Parr one undergoing withdrawal is capable of saying anything (R. 1071-1073).

This striking conclusion was corroborated and taken even further by Dr. Rufus Vaughn, a psychiatrist who examined Mr. Martin within three weeks of the July 4 confession and on six more occasions thereafter. Based upon the same facts presented to Mr. Parr, upon his examination of Mr. Martin, and upon his listening to the tapes of the July 4 confession, Dr. Vaughn concurred that Mr. Martin was undergoing alcohol withdrawal (R. 1116). More significantly, however, Dr. Vaughn also testified that, in his opinion, Mr. Martin was, in addition legally insane at the time he gave his July 4 confession (R. 1102). In Dr. Vaughn's opinion, Mr. Martin suffered from full-blown paranoid schizophrenia, which was so masked over by anti-social behavior that the interrogators would not necessarily have known that Mr. Martin was psychotic (R. 1108-1109, 1117). Mr. Martin's psychosis would have profoundly confused his thought processes during interrogation, to such an extent that he would "not [have] be[en] able to separate out what had happened from what was inside himself." (R. 1111) Respecting his ability to understand and respond to instructions and questions in the interrogation process, the psychosis "would tend to make [his] responses relatively automatic rather than thoughtful or cognitive in the sense of

putting everything together in a totality." (Ibid.) The alcohol withdrawal overlaid on Mr. Martin's psychosis would have magnified these tendencies toward confused, "automatic" thought processes. (R. 1110)

> "The brain of the alcoholic at a time like that [during withdrawal] really operates in an almost automatic kind of fashion and cannot receive and integrate new information and often cannot receive, integrate and act on instructions. They are quite helplessin terms of environment. They are not able to make rational choices.
>
> "The ordinary alcoholic would often give items, history, which has not occurred and cannot be documented by the family."

(R. 1115)

With respect to whether Mr. Martin could have given a confession voluntarily and intelligently under these circumstances, Dr. Vaughn concluded that he could not have. His ability to have understood and responded intelligently to the questions asked him would have been "extremely limited." (R. 1116) He would have had "no capability" to understand and decide whether to answer questions, and "no ability" to understand that he had a right not to make a statement. (R. 1116-1117) Moreover, through a long period of interrogation, if Mr. Martin had not made a statement, that would have been "extremely unusual ... [for] ... [s]chizophrenics will eventually talk to you." (R. 1117) Despite the utter unreliability and involuntariness of the statement thus produced by a combination of psychosis and alcohol withdrawal, however, the statement, taken in isolation, could appear to have been made by a "rational"

individual. Indeed, Mr. Martin's confessions gave such an appearance. As explained by Dr. Vaughn, in response to the trial judge's question whether he had detected in the sound of Mr. Martin's voice on the tape (of his confession) anything that confirmed his diagnosis,

> "[t]he tapes sound very good and convincing in terms as though this is 'factual.' So to answer your question, no, I can't hear anything that is particularly odd or peculiar.
>
> The thing is, however, that in determining paranoid schizophrenics, I have many, many times seen them give the most extraordinary stories with the most extraordinary embellishments and with the most convincing kinds of presentations so that I find it very, very difficult to rely on a single or even two statements such as this with the history that I see and the observations I made of him subsequently.
>
> So a paranoid schizophrenic could be extremely convincing and not appear on the surface to be deviant in their speech or actions."

(R. 1147-1148)

One week after the July 4 confession, to which the foregoing discussion has been directed, Mr. Martin confessed again. Some of the circumstances surrounding the July 4 confession were no longer present when Mr. Martin gave his July 11 confession. Mr. Martin was not subject to psychologically coercive interrogation, nor was he undergoing alcohol withdrawal. However, in the opinion of Dr. Vaughn, he was still insane, and to the same degree as before. (R. 1102) Thus, he was still quite vulnerable to the possibility of confessing to that which he had not done, and he still had very little, if any, capacity to decide not to answer questions directed to him. Despite the

absence of psychologically coercive interrogation and alcohol withdrawal on July 11 -- which together with Mr. Martin's psychosis had produced the confession on July 4 -- new factors emerged on July 11 to produce that day's unreliable, involuntary confession.

The first factor was the reason underlying Mr. Martin's request to speak to Detective Glover again, along with his parole officer, on July 11. His reason was not to make a "rational, voluntary" statement despite the express advice of his counsel to the contrary.[4/] Rather, it was to manipulate a meeting with his parole officer in order "to use her as leverage to get a gun and commit suicide." (R. 637) (Detective Glover's testimony). Thus a suicidal motive, rather than a rational, voluntary desire to make a statement and waive the assistance of counsel, impelled the meeting on July 11 between Mr. Martin, Detective Glover, and Chris Dietert (Mr. Martin's parole officer).

The second factor which combined with Mr. Martin's psychosis on July 11 to produce his second confession was a violent attack upon Mr. Martin by various officers, provoked by his attack upon Ms. Dietert (in order to carry out his plan of suicide) (R. 636). In the attack by the officers, Mr. Martin received a severe cut over the eye (R. 638). His statement, made immediately thereafter, was given while he was confined (for security reasons) under a stairwell (R. 636) and while he

---

4/ Between July 4 and July 11, 1977, Mr. Martin had been formally charged in a non-adversary probable cause hearing, prior to which counsel had been appointed. (R. 1-30) Thus, Mr. Martin's Sixth and Fourteenth Amendment right to the assistance of counsel was also implicated in connection with this confession.

was bleeding (R. 639, 733). While taking Mr. Martin's statement, Detective Glover testified that Mr. Martin had "a wild and yet at the same time frustrated type of look," (R. 640), that he was "shaking," (R. 641), and that he was "in a very emotional state," such that Detective Glover thought that he might "cry ... a couple of times during the statement ..." (Ibid.) According to Detective Glover, these actions were similar to Mr. Martin's actions in the July 4 interrogation (R. 642-643). Only after Mr. Martin gave his statement was he taken to the hospital for treatment of his head injury (R. 1016).

Thus, as on July 4, the statement given by Mr. Martin on July 11 was also the product of his psychotic thought processes, activiated by suicidal ideation and the fear engendered by the violent assault upon him.

Despite all of the foregoing evidence, uncontradicted factually or through expert opinion evidence by the state in the suppression hearing,[5] the trial court found that both confessions were voluntarily and intelligently given and that Mr. Martin had validly waived his Fifth, Sixth, and Fourteenth Amendment rights not to be compelled to incriminate himself and to have the assistance of counsel at a critical stage of the proceedings.

Thereafter at trial, the only issue in dispute between Mr. Martin and the State was whether Mr. Martin was insane at

---

5 /The state produced no psychiatrist, or anyone else, to dispute the opinions by Dr. Vaughn that Mr. Martin was insane at the time of both confessions and by Dr. Vaughn and Mr. Parr that Mr. Martin was undergoing alcohol withdrawal as well at the time of the July 4 confession.

the time of the offense. The only defense expert presented in support of this issue was Dr. Vaughn. Dr. Vaughn testified, as he had at the suppression hearing, that Mr. Martin suffered from paranoid shizophrenia (R. 3655). This condition, in Dr. Vaughn's opinion, caused Mr. Martin to be insane at the time of the offense (R. 3654).

The state presented three witnesses in rebuttal. Dr. Antonio Fueyo and Dr. Lionel Blackman, both psychiatrists, concluded that Mr. Martin knew right from wrong at the time of the offense (R 3755, 3845). Each diagnosed him as a sociopath or psychopath (R 3766-2767, 3850). Each also believed that Mr. Martin was "faking" symptoms of psychosis in order to impress upon the doctors that he was quite ill -- when, in their opinions, he was not. (R. 3756-3760; 3895) The state's third witness Dr. Isidor Scherer had no opinion as to Mr. Martin's sanity at the time of the offense (R. 3912). However, on the basis of the psychological tests which he administered to Mr. Martin, Dr. Scherer concluded that Mr. Martin's test results indicated either that he was faking or that he suffered from extreme psychosis (R. 3912, 3935). Dr. Scherer believed that Mr. Martin was feigning the psychotic symptoms (R. 3935).

Thus, the sole issue in dispute boiled down to whether Mr. Martin was extremely psychotic or was feigning psychosis in order to dvelop a defense. Counsel for Mr. Martin recognized this critical issue prior to trial (R. 4590-4593) and moved for the appointment of an additional expert, Dr. Theodore Blau (R. 4749-4750). Dr. Blau was a clinical psychologist whose

special expertise in psychological testing led him to the preliminary opinion that the psychological tests administered by Dr. Scherer were improperly administered and improperly evaluated (R. 4591; 4749). In moving for the appointment of Dr. Blau, counsel for Mr. Martin stated explicitly that "if the Defendant were not indigent, he would retain the services of Dr. Theodore H. Blau to examine him and to render an opinion as to his sanity at the time of the offense," (R. 4749), and that "because there had been the allegation that my client was faking his insanity, ... this direct contradictory evidence of Dr. Blau was important and crucial to the defense." (R. 4592-4593) The trial court denied Mr. Martin's motion prior to trial, because in the court's opinion there had been sufficient evaluation of Mr. Martin (R. 1194-1195), and denied his post-trial motion for a new trial on this ground for the same reason (R. 4594-4595).[6/] Mr. Martin raised this issue on appeal as a denial of due process and equal protection (Initial Brief of Appellant, at 27-33; Reply Brief of Appellant, at 7-10), and the Florida Supreme Court denied relief without any discussion of the issue.

6/ A total of seven persons had evaluated Mr. Martin prior to the making of this motion. Three (two psychiatrists and a psychologist) had been retained by defense counsel without court appointment. Three (two psychiatrists and a psychologist) had been appointed on the State's motion. The seventh, a neurologist, had been appointed on Mr. Martin's motion. The neurologist found no evidence of neurological impairment; the three defense experts all found that Mr. Martin was paranoid schizophrenic, with Dr. Vaughn concluding that as a result Mr. Martin was competent to stand trial (R. 3727-3732) but insane at the time of the offense and at the time of both confessions (R. 3655, 1102), with Dr. Barnard concluding that as a result Mr. Martin was incompetent to stand trial (R. 178; but being unable to render an opinion as to sanity at the time of the offense, and with Dr. Levin reaching no stated conclusions as to competency or sanity; and finally, the three court-appointed (on the state's motion) experts all found that Mr. Martin was not psychotic, was feigning psychotic symptoms, and was a sociopath.

Following Mr. Martin's conviction, the penalty phase of his trial focused again on his mental condition at the time of the offense. Dr. George Barnard, a psychiatrist, testified for the defense that in his opinion at the time of the homicide, Mr. Martin was under the influence of extreme mental or emotional disturbance, was acting under extreme duress, and had his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired (R. 4299). Dr. Vaughn was recalled and he reached the same conclusion (R. 4376-4377) even if hypothetically Mr. Martin was not, as he believed him to be, psychotic (R. 4379). Dr. Hans Zeisel, professor emeritus of law from the University of Chicago, testified and produced extensive evidence that the death penalty is not a deterrent to murder (R. 4322-4369). However, when defense counsel sought to have Dr. Zeisel relate deterrence to a case, such as Mr. Martin's in which mental illness may be a factor, the prosecutor's objection was sustained (R. 4340-4345).

Following rebuttal by the State, instructions to the jury, and almost four hours of deliberations, the jury returned an advisory verdict of death (R. 4500, 4504, 4506). The trial judge imposed the death sentence in accord with this recommendation and entered findings in support of the death sentence (R. 4831-4841).

REASONS FOR GRANTING THE WRIT

I.

THE FOURTEENTH AMENDMENT CANNOT PERMIT A TRIAL COURT TO DISREGARD THE STRONG POSSIBILITY THAT A DEFENDANT'S CONFESSIONS WERE THE PRODUCT OF INSANITY SOLELY BECAUSE THE TAPED RECORD OF THE CONFESSIONS REFLECTED "INDICIA OF VOLUNTARINESS," AND THE CIRCUMSTANCES UNDER WHICH THE CONFESSIONS WERE GIVEN WERE NOT COERCIVE ENOUGH TO OVERRIDE THE WILL AND INTELLECT OF A SANE PERSON.

The trial court's refusal to suppress Mr. Martin's confessions raises an important question concerning the proper evaluation of the voluntariness and rationality of a confession by a defendant who was, in all probability, insane at the time of his confessions. The Court has previously considered this question in Blackburn v. Alabama, 361 U.S. 199 (1960). In Blackburn, "the evidence indisputably establishe[d] the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed." 361 U.S. at 207. When this central fact was coupled with the remaining circumstances surrounding the confession -- all of which provided opportunities for the coercion of a confession, 351 U.S. at 207-208 -- the Court held that the use of the confession violated due process, for "the evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition." 361 U.S. at 211.

While Blackburn thus pronounced a confession involuntary and unintelligent when "the evidence indisputably establishe[d] the strongest possibility that [the defendant] was insane and incompetent" at the time of the confession, it did not articulate a clear standard for evaluating the constitutionalty of a confession which may have been the product of insanity but which was not as clearly the product of insanity as the confession

in Blackburn. This case raises this important and troublesome issue.

In this case, it can clearly be said that the trial judge's resolution of this issue is not consistent with the Due Process Clause, whatever a proper resolution should be.

As discussed at length in the Statement of the Case, the evidence before the trial judge on Mr. Martin's motion to suppress showed, without contradiction and with respect to both confessions, (1) that Mr. Martin was overtly psychotic, unable to answer questions reflectively, at the time he confessed; (2) that he was subject to additional physiological or emotional influences (alchohol withdrawal on July 4 and suicidal ideation on July 11) at the times he confessed which tended to diminish his already-weakened capacity for rational, voluntary behavior; and (3) that he was subject to treatment by the authorities at the times he confessed which could readily have coerced him into making the confessions.

While this evidence was remarkably similar to the evidence before the judge in Blackburn, the evidence of psychosis here must have been in dispute in the trial judge's mind even though it was not in dispute in the evidence adduced at the suppression hearing. During the two days preceding the suppression hearing, the judge had presided over Mr. Martin's competency hearing. (R. 158-433) In that hearing, even though the judge heard Dr. Barnard give a second opinion that Mr. Martin was psychotic,[7/] the judge also heard Dr. Scherer, Dr. Fueyo and Dr. Blackman testify that Mr. Martin was not psychotic but that

---

7/The Court will recall that Dr. Vaughn was to testify similarly in the suppression hearing (R. 1102).

he was trying to make himself appear to be psychotic. (R. 249-319; 331-371; 375-425). Thus, despite the formal record on the motion to suppress, the evidence of psychosis was not as indisputable in the judge's mind in this case as it apparently was in Blackburn.

Nonetheless, Mr. Martin did present a probability that his confession was the product of insanity. Yet the trial judge completely ignored this evidence. He did so by finding "indicia of voluntariness" in the tape recordings of Mr. Martin's confessions. (R. 4757, 4760) With this finding, he apparently found that Mr. Martin was not insane -- though he did not say so -- and proceeded to determine that the coercion inherent in the circumstances attendant to both confessions was insufficient to make them involuntary or unintelligent. (R. 4759, 4760)

The trouble with the judge's approach is that he could not find that Mr. Martin was sane, as he did,solely on the basis of the "indicia of voluntariness." As Dr. Vaughn explained at the suppression hearing, Mr. Martin could be absolutely psychotic and sound as if he were absolutely in control of all his faculties. (R. 1147-1148). This Court recognized that precisely the same facts in Blackburn could not support any inference of voluntariness or rationality.

Accordingly, there is no factual support for the trial judge's finging upon which he apparently determined that Mr. Martin's confession was not the product of insanity. While the trial judge thus improperly ignored the probability that Mr. Martin was insane at the time of his confessions, it is now

impossible to say what a proper resolution of this issue would have been had the judge evaluated, and not avoided, the evidence. At the very least, Mr. Martin's conviction should be reversed for the trial judge's failure to evaluate properly the probability that insanity compelled his confession. At the same time, the Court should articulate principles in this area that require probabilities of insanity-produced confessions, such as those raised by Mr. Martin's case, to be evaluated directly and fairly by the trial courts.

II.

A STATE TRIAL COURT'S REFUSAL TO PROVIDE AN INDIGENT DEFENDANT THE ASSISTANCE OF AN EXPERT, IN CIRCUMSTANCES IN WHICH A REASONABLE ATTORNEY WOULD ENGAGE SUCH SERVICES FOR A CLIENT HAVING THE INDEPENDENT FINANCIAL MEANS TO PAY FOR THEM, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF THE ASSISTANCE OF COUNSEL AND EQUAL PROTECTION.

The question raised here is concerned with whether, in relation to the use of expert assistance by a criminal defendant, the constitution can tolerate discrimination between indigent defendants and defendants who possess the means to protect their rights. In other contexts, this Court has consistently held that the constitution cannot tolerate such discrimination. See, e.g. Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in state trial courts); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Roberts v. LaVallee, 389 U.S. 40 (1967) (right to transcript of preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for misdemeanors); Bounds v. Smith, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or

professional assistance in habeas proceedings). While the answer to the question posed should, therefore, be "no," the Court has not before considered the question. Mr. Martin submits that his case not only begs for an answer to this question, but also presents the question in a context in which the Court can provide much-needed guidance to other courts.

As described in detail in the Statement of the Case, Mr. Martin was the beneficiary of some court-provided expert assistance. However, the provision of defense experts still left him one witness short on the critical issue of his trial: whether he was psychotic or a self-serving fabricator of psychotic symptomatology. In the context of the evidence, the evidence adduced by the State's experts tended to be weightier and thus weighed toward a finding of fabrication. However, counsel for Mr. Martin had located a new expert witness who could, at the very least, have counter-balanced the evidence by demonstrating that the factual basis for one of the state's expert's opinions was erroneous. Counsel averred that the witness was crucial to his client's defense (R. 4592-4593), and on the basis of an objective assessment, he was correct, since the credibility of Mr. Martin's illness -- and his only defense -- hung in the balance. Moreover, counsel averred that he would retain this new expert if his client were not indigent (R. 4749).

These circumstances thus cry out for the articulation of principles guiding the provision of expert defense witnesses for indigent criminal defendants. Mr. Martin's case does not present the question as to whether such witnesses must be

provided. He was provided defense experts, and the constitutional necessity of providing some experts to indigent criminal defendants is so clear that this Court need not provide the answer. However, the difficult recurring question is precisely the question presented by Mr. Martin's case: to what extent must expert assistance be provided indigent criminal defendants?

The only analysis of this issue to date has been in connection with federal criminal proceedings. In such proceedings, 18 U.S.C. §3006A (e)(1) authorizes the provision of "expert... services necessary to an adequate defense" upon a showing "that the services are necessary." The uniform interpretation of this statute by the Courts of Appeals is that the showing "that the services are necessary" is sufficiently made

> "... when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them."

United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). See also, Williams v. Martin, 618 F.2d 1021, 1025-1026 (4th Cir. 1980); United States v. Durant, 545 F.2d 823, 826-827 (2d Cir. 1976); Brinkley v. United States, 498 F.2d 505, 507-510 (8th Cir. 1974); United States v. Chavis, 476 F.2d 1137, 1143 (D.C. Cir. 1973); United States v. Tate, 419 F.2d 131 (6th Cir. 1969).

Under the federal rule, Mr. Martin would have been provided the expert requested. Since that statutory rule was enacted "to implement the sixth amendment guarantee of the assistance of counsel," Proffitt v. United States, 582 F.2d 854

857 (4th Cir. 1978) [citing 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963)], the same standard should be articulated for and applied to state criminal proceedings. Mr. Martin's case provides a tailor-made opportunity for the Court to do just that.

III.

THE FLORIDA SUPREME COURT'S CURSORY RECITATION OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE CONTRAVENED THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976).

The manner of review by the Florida Supreme Court in the instant case did not meet the constitutional requirements for appellate review enunciated in Proffitt v. Florida, 428 U.S. 242 (1976). In upholding the constitutionality of Florida's capital sentencing scheme, this Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 251. The appeal procedure was thus seen as an integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In this Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently

whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

This Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed... to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The Florida Supreme Court's opinion in the present case does not meet the assurances relied upon by the Court in Proffitt. In its singular lack of any analysis, despite serious constitutional questions, the Florida Supreme Court's opinion fails to meet the court's constitutional responsibility. Instead the court's opinion suggests that it engaged in precisely the "cursory or rubber stamp review" that this Court trusted would not occur. Id. at 259.

In Mr. Martin's case, the Florida Supreme Court's "review" of the aggravating and mitigating circumstances consisted entirely of the following:

"The jury recommended the death sentence. The judge found five aggravating circumstances, all of which are supported by the record, and presented his reasons therefor. [Footnote setting forth judge's findings omitted.] Although there was extensive conflicting expert testimony on Martin's mental condition, the court carefully considered this and concluded that the mental mitigating circumstances did not apply."

Martin v. State, supra, 420 So.2d at 585 (Appendix 3a). Never given any analysis in this review were the following substantial errors in the assessment of aggravating and mitigating circumstances:

(a) In its instructions to the jury and in its findings, the trial court failed to instruct the jury to give less weight, and failed itself to give less weight, to the "heinous, atrocious or cruel" aggravating circumstance [Fla. Stat. §921.141 (5)(h)] in light of the heinousness of the crime being a product of mental illness, as required by Huckaby v. State, 343 So.2d 29, 33-34 (Fla.1977). Because of the failure to limit the weight of this circumstance as required, petitioner's sentence may have been imposed under a standard inconsistently applied, and harshly, to him. See Godfrey v. Georgia, 446 U.S. 420 (1980).

(b) The aggravating circumstances set forth at Fla. Stat. § 921.141 (5) (a) and (b) [murder committed by person under sentence of imprisonment; previously convicted of felony involving use of violence] were duplicated in Mr. Martin's case, for the judge found both circumstances on the basis of the same fact: the prior conviction of a violent felony. By this error, the aggravating circumstances in Mr. Martin's case appeared weightier than the facts allowed, thus opening the door to the unguided exercise of sentencing discretion.

(c) In direct violation of the principles articulated in Godfrey v. Georgia, supra, the finding of the aggravating circumstance set forth at Fla. Stat. §921.141(5)(e) [homicide committed to avoid arrest] extends the limits of the application of this circumstance -- established in Riley v. State, 366 So.2d 19 (Fla. 1979) and Menendez v. State, 368 So.2d 1278 (Fla. 1979) -- beyond the point at which the circumstance can be said, on a principled basis, to be present in some

cases and absent in others.

(d) In direct violation of Furman v. Georgia, 408 U.S. 238 (1972) and its progeny, the Court permitted the introduction of evidence of non-statutory aggravating circumstances: petitioner's prior indictment (but not conviction) for premeditated murder and an allegation that petitioner previously had attempted to commit a premeditated murder.

(e) The trial court failed as a matter of law to consider petitioner's mental condition in mitigation of punishment, either because petitioner failed to establish that he was legally insane or because petitioner failed to prove that his mental condition met the statutory mitigating circumstances. See Eddings v. Oklahoma, 455 U.S. 104 (1982).

(f) The trial court excluded mitigating evidence pertaining to the character of petitioner when it excluded testimony concerning the lack of any deterrent effect of the death penalty on persons, such as petitioner, whose crimes were produced by mental illness. See Lockett v. Ohio, 438 U.S. 586, 603-605 (1978) (plurality opinion).

Mr. Martin's case thus presents precisely the same issue currently before the Court in Barclay v. Florida (No. 81-6908): whether the Florida Supreme Court's affirmance of a death sentence without setting aside, and considering the impact of, erroneously found aggravating circumstances and erroneous determinations that there are no mitigating circumstances, can be sustained under the Eighth Amendment. At the very least, therefore, Mr. Martin's petition should be held in abeyance pending the decision in Barclay. See, e.g. Davis v. Georgia, Spraggins v. Georgia, Collins v. Georgia, Baker v. Georgia, Hamilton v. Georgia, Brooks v. Georgia, 446 U.S. 961 (1980) [cases held pending the decision in Godfrey v. Georgia, supra].

CONCLUSION

For the reasons expressed herein, the Petitioner, Nollie Lee Martin, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner.